any statute imposing partnership liability, extends the stockholders' obligations and liabilities a step farther than the agency cases. However, so far as the doctrines of the conflicts of laws are concerned, the principal case is not inconsistent with the principles developed in the evolution of the law governing stockholders' liabilities, inasmuch as the Tennessee court, the *lex loci contractus* and the *lex fori* being identical, pursued its own policy and applied its own fundamental common-law rules, regardless of any rules of "comity" and of the laws of Delaware.

G. S., JR.

TORT ARISING FROM ATTEMPTED FULFILMENT OF CONTRACT.

A recent Minnesota decision[1] presents an interesting question in the tort liability assumed by one who undertakes an employment. The defendant detective agency, being employed to obtain information concerning the conduct of the plaintiff's wife, negligently shadowed another woman, and falsely reported to the plaintiff that his wife's conduct was immoral. The plaintiff in reliance thereon charged his wife with such misconduct, whereupon she left him definitely. The plaintiff now seeks to recover damages for the alienation of his wife's affections resulting from such negligence, expressly waiving recovery of the sum paid for services. The court decided that, in order to recover from a third party for alienating the affections of a spouse, the plaintiff must show active and intentional conduct of defendant in causing such estrangement, and that the modified complaint here stated no cause of action.

Without question the proposition on which the court grounds the dismissal of the suit is correct.[2] Mere negligence is not sufficient to give an action for the common-law tort of alienation of a wife's affections. Yet it is open to question whether the complaint does not state a good cause of action for negligent misfeasance, into which such alienation would enter as a damage element. The plaintiff, says the court, "grounds his action wholly upon the claim that defendant was negligent in the performance of duties which plaintiff employed it to perform."

Whether a duty be undertaken gratuitously or for hire, one

[1] *Lilligren v. Burns International Detective Agency* (1916) 160 N. W. (Minn.) 203.

[2] See *Tasker v. Stanley* (1891) 153 Mass. 148, and cases cited.

undertaking, renders himself liable in case of misfeasance to an action on the case.[3] This action is distinct from that on the contract proper, if there be such: it will not lie for failure to begin performance at all[4] but will for misdoing, either by irrevocable completion in a wrong fashion,[5] or by failure to complete an act once undertaken[6]; it may lie where a contract action could not be maintained, as where in England a servant, carried by a common carrier on a contract with his master, sues in his own name to recover for damage to his baggage[7]; it is founded on the general duty of every man to use due care to do whatever he may begin in such manner as not to injure his neighbor. The test seems to be, whether, disregarding the contract, there would still be a legal duty on the defendant.[8] In the principal case we have that relation between plaintiff and defendant which has been called an *undertaking:* a relation arising out of a voluntary act by one whereby he undertakes a duty to another not dependent, as is a contract, on a promise supported by consideration.[9] Here the voluntary act was the investigation and report to plaintiff of the supposed conduct of his wife. The defendant was liable for his negligence in not employing such skill as he had,[10] or even, it would seem, such skill as he held himself out to have.[11] Nor are the fact and amount of consideration of importance, except as evidencing the duty to employ that skill.[12]

This being a special action on the case, special damage must be proved[13]—in this case of alienation of the wife's affections. Inasmuch as the plaintiff's own voluntary act of accusation intervened before the damage was done, the question arises whether it was not remote or avoidable. The true test would seem to be whether the act of the intervening agency was such as was to be expected to happen on the defendant's act: if it was so to be

[3] *Coggs v. Bernard* (1703) 2 Ld. Raym. 909.

[4] *Elsee v. Gatward* (1793) 5 T. R. 143; *Courtenay v. Earle* (1850) 10 C. B. 73.

[5] *Elsee v. Gatward, supra; Brown v. Boorman* (1844) 11 Cl. and F. 1.

[6] *Bagaglio v. Paolino* (1913) 35 R. I. 171.

[7] *Marshall v. York, Newcastle and Berwick Ry. Co.* (1851) 11 C. B. 655; *Kelly v. Metrop. Ry. Co.* [1895] 1 Q. B. 944.

[8] *Turner v. Stallibrass* [1898] 1 Q. B. 56.

[9] See (1891) 5 HARV. L. REV. 222.

[10] See *Shiells v. Blackbourne* (1789) 1 H. Bl. 158.

[11] Cf. *Walker v. Goodman* (1852) 21 Ala. 647.

[12] *Coggs v. Bernard, supra.*

[13] Cf. *Harrow School v. Alderton* (1800) 2 Bos. & P. 86.

expected, the result is not a remote consequence. In the case of a human agency the result will generally be of a sort not to be expected.[14] Yet, whereas the loss of credit, for instance, incident to an injury to a merchant's stock in trade, is too remote for recovery,[15] similar loss of credit following a blow at a merchant's credit has been held a proximate damage.[16] It is submitted that the blow here directed at plaintiff's family life was thus direct: the most natural, and as shown by the event, the intended purpose of the information in question was the revelation of it to the plaintiff's wife, or the use of it in some other way, as in a divorce court, to the dissolution of the plaintiff's household. Such a dissolution followed from the use of the false information. In concentrating their attention on the supposed tort action for alienation of affections, then, the court may well have overlooked the true, and valid, theory of the plaintiff's complaint.

K. N. L.

THE RIGHT OF A PAYEE OF A STOLEN CERTIFIED CHECK WHO HAS GIVEN VALUE FOR IT.

An interesting question involving an interpretation of the N. I. L. was recently answered by the New York Supreme Court in a decision holding that a payee who received a check from one who stole it from the drawer's agent and who, pretending to be such agent, obtained value to the amount of the check, was not a holder in due course under section 91 and hence could not recover on the instrument.[1]

The facts of the case show that a stock brokerage firm drew its check on the defendant bank payable to the order of the plaintiff trust company. The check was handed to a clerk who was instructed to have it certified and to deliver it to the payee in payment for revenue stamps. Immediately after the check was certified, it was either stolen or erroneously handed to some party other than the clerk by the bank officer. This party, representing himself as a messenger from the drawer firm, delivered the check to the plaintiff-payee, and received the amount in

[14] Sedgwick, *Damages* (8th ed.) Vol. I, p. 186.
[15] *Lowenstein v. Monroe* (1880) 55 Ia. 82.
[16] *Larios v. Bonany* (1873) L. R. 5 P. C. 346.
[1] *Empire Trust Company v. Manhattan Co.* (1917) 162 N. Y. S. (App. Div.) 629.